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Nos. 86-100 and 86-111

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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM T. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Fed. R. Crim. P. 23(b), which authorizes a district court to excuse a juror for just cause after deliberations have begun and to allow the 11 remaining jurors to return a verdict, is constitutional (Nos. 86-100, 86-111).

2. Whether the district court's supplementary instructions introduced a new theory of criminal liability (No. 86-100).

3. Whether the district court committed reversible error when it refused to order production of certain confidential medical records of the principal government witness (No. 86-111).

4. Whether the district court committed reversible error when it denied petitioner Stoneman's severance motion (No. 86-111).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 789 F.2d 196.[1]

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-100.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1986. Petitions for rehearing were denied on May 23, 1986 (86-100 Pet. App. 54a-55a; 86-111 Pet. App. B1). The petition for a writ of certiorari in No. 86-100 was filed on July 12, 1986, and the petition in No. 86-111 was filed on July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted of conspiracy to commit mail fraud and to travel interstate in aid of racketeering, in violation of 18 U.S.C. 371. Petitioner Smith was also convicted on four counts of mail fraud and four counts of use of an interstate facility to promote acts of bribery, in violation of 18 U.S.C. 1341 and 1952, while petitioner Stoneman was acquitted on the substative counts. Smith with sentenced to 12 years' imprisonment and fined $63,000. Stoneman was sentenced to four months' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-24a).

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 4a-7a), showed that in 1983 and 1984 petitioners participated in a conspiracy to bribe public officials in order to obtain inflated contracts from the Commonmonwealth of Pennsylvania and its political subdivisions. The contracts at issue were contracts to prepare applications for the recovery of excess Social Security (FICA) taxes paid to the federal government. In early 1983, petitioner Smith, the Republican Party Chairman of Dauphin County, Pennsyl-

vania, began discussions with John Torquato, the son of a former Democratic Party Chairman for Cambria County, Pennsylvania, about how to obtain such contracts. Smith and Torquato agreed to make political contributions to officials who could influence the awarding of FICA recovery contracts. After enlisting the help of David Herbert, the State Director of Social Security, to identify potential sources of FICA recovery contracts, Smith and Torquato decided to concentrate on Allegheny County, the City of Pittsburgh, and the State government. The FICA recovery contracts for those entities were pursued from January 1983 through October 1984 with the assistance of petitioner Stoneman, who, like Smith, is a lawyer. Pet. App. 4a-5a.

a. In April 1983, a contract from Allegheny County was obtained by co-defendant CTA, Ltd., Inc., a corporation formed by petitioner Stoneman in November 1982. Petitioners also used CTA to buy influence with James Scanlon, the head of Allegheny County Computer Services, and with Eugene Scanlon (James' brother), the Minority Whip of the Pennsylvania Senate. They paid for a weekend trip to New York for James Scanlon and his family and offered him a $50,000 job with CTA. They offered Eugene Scanlon mailing lists for his daughter's business, the use of a rental car, payment of the cost of an airline ticket for a third Scanlon brother, and $100,000 to set up what Torquato called a "widget factory" in Hong Kong. Pet. App. 4a-5a.

On December 16, 1983, shortly after the contract with Allegheny County came to an end, Torquato sent Smith a check for $1,000 for his services, with a letter discussing how to increase their influence with Herbert. They agreed on a strategy, and on

January 5, 1984, Stoneman created a California corporation known as Com-Max. The conspirators' plan was to furnish Herbert and other officials with stock in Com-Max, which would increase in value if the officials used their influence and authority to award excessively profitable FICA recovery contracts to CTA or other companies associated with Com-Max. Pet. App. 5a.

Late in January, Stoneman sent 1,500 shares of Com-Max stock to Herbert and another 1,500 shares to the chief clerk of Allegheny County, promising to repurchase the stock in three years for at least $15,000. In September 1984, Allegheny County selected CTA for another FICA recovery contract, even though other companies had submitted much lower bids. The contract was signed by Torquato on Stoneman's behalf and by the chief clerk of Allegheny County. Pet. App. 5a.

b. The City of Pittsburgh entered into a $150,000 FICA recovery contract with CTA for the year beginning June 1983. CTA then hired an unsuccessful bidder for the contract to do the work for $35,000. CTA obtained the contract from the city by making payments to Robert Rade Stone, the President of the Pittsburgh City Council. Stone was given $6,374.86 in cash and options for 35,000 shares of Com-Max stock. Both payments were made through petitioner Stoneman. Profits from the FICA recovery contracts were to be used to increase the value of the Com-Max stock. Pet. App. 5a.

c. Petitioners' successful effort to obtain the FICA recovery contract for all Pennsylvania state employees began in early 1983. Smith and Torquato first offered money to Republican State Chairman Robert Asher. With his assistance, they obtained a hearing in the Governor's Office, which controlled

the award of the contract. When it appeared that the Governor's Office would not produce a contract for them, Smith and Torquato successfully undertook to have legislation enacted to transfer the contract-awarding power to Smith's long-time friend, State Treasurer R. Budd Dwyer. Senate Minority Whip Eugene Scanlon and House Majority Leader Jim Manderino helped in getting the legislation passed. The day the bill passed in the lower house, Torquato purchased $500 in tickets to a fund-raising event sponsered by Manderino. Pet. App. 6a.

On May 10, 1984, the Treasurer, after discussions with Smith and Torquato about a $300,000 payment, awarded the Pennsylvania contract to Computer Technology Associates, Inc., a Pennsylvania corporation that Smith and Torquato had formed the previous month. Out of the $6 million price of the contract, Smith and Torquato were to receive $4 million in profits. The afternoon the contract was awarded, Torquato met with Herbert and offered him $100,000 to be deposited in a Swiss bank account. Pet. App. 6a.

Smith immediately sought a legal ruling from the Attorney General of Pennsylvania that the contract was exclusive. Through the Attorney General's Press Secretary, Smith offered to provide $100,000 for the Attorney General's reelection campaign. The Attorney General ruled that the Treasurer's Counsel could decide the issue, and the Treasurer's Counsel subsequently ruled that the contract was exclusive. Pet. App. 6a-7a.

In June 1984, shortly after securing the lucrative state contract, Smith and Torquato, with Stoneman's knowledge, formed a new corporation to try to hide the connection between Com-Max and Computer Tech-

nology Associates, Inc. An investigation commenced soon thereafter. A search of Torquato's home produced records of payments to various public officials, including Dwyer, Herbert, Eugene Scanlon, and Stone. The state contract was voided. An accounting firm eventually performed the work required by the $6 million contract for between $845,000 and $1,300,000. Pet. App. 7a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-24a). The court upheld the district court's decision to allow jury deliberations to go forward with 11 jurors after one of the deliberating jurors became disabled by a car accident on the fourth day of deliberations (Pet. App. 18a-19a). The court of appeals held that Fed. R. Crim. P. 23(b), which permits a district court to proceed with a jury of 11 in such circumstances, is not unconstitutional. The court also rejected petitioners' contention that the district court had introduced a new theory of liability on the conspiracy count when the court gave the jury a supplemental instruction on the issue of multiple conspiracies (Pet. App. 10a-14a). The court of appeals further held that petitioners' constitutional rights were not impaired by the trial court's refusal to order the production of the confidential alcoholism-treatment records of John Torquato, who was the government's chief witness and whose admitted alcoholism was the subject of his own and others' testimony (Pet. App. 19a-21a). Finally, the court of appeals upheld the district court's denial of petitioner Stoneman's motion for severance. The court concluded that Stoneman had suffered no prejudice, because the jury could readily separate the evidence presented against each of the two defendants (Pet. App. 21a-22a).

ARGUMENT

The decision of the court of appeals is correct, it raises no signficant issue of federal law, and it does not conflict with decisions of this Court or of other courts. Accordingly, further review by this Court is not warranted.

1. Petitioners challenge (Smith Pet. 11-14; Stoneman Pet. 8-14) their convictions by an 11-person jury as unconstitutional. On the fourth day of jury deliberations, after a trial of almost three months, one of the deliberating jurors was injured in an automobile accident and could no longer participate in the deliberations. Over petitioners' objections, the district court directed the jury to continue deliberations with only 11 members. That course was authorized by a 1983 amendment to Fed. R. Crim. P. 23(b), which permits an 11-person jury if the district court finds it "necessary to excuse a juror for just cause" after deliberations have commenced. The jury thereafter reached a unanimous verdict.

Petitioners' argument that Rule 23(b) is unconstitutional is meritless. The only other federal court to consider the question readily concluded, as the Third Circuit did here, that the provision is constitutional. *United States* v. *Stratton*, 779 F.2d 820, 830-835 (2d Cir. 1985), certs. denied, Nos. 85-6741 and 85-1919 (June 2 and 23, 1986). That conclusion is correct. The Constitution does not require 12 jurors for conviction. *Williams* v. *Florida*, 399 U.S. 78 (1970). Conviction by an 11-person jury is no less valid because the jury began with 12 members. There is a strong public interest in completing a trial, like petitioners', that has consumed vast public resources; and reducing the jury from 12 to 11 in no way impairs the interest of a defendant in a jury

that is fair, impartial, and deliberative.[2] The provision of Rule 23(b) that authorizes such a reduction —in the district court's "discretion," but only when it is "necessary" and there is "just cause"—was properly promulgated by this Court pursuant to 18 U.S.C. 3771 and is a sensible solution to a problem that arises rarely and unpredictably. See Advisory Committee Notes to Fed. R. Crim. P. 23; *United States* v. *Stratton*, 779 F.2d at 831-833.

2. Petitioner Smith challenges (Smith Pet. 8-11) certain supplemental jury instructions, which he claims altered the theory of liability from the one set forth in the indictment. The trial court initially instructed the jury on the distinction between a single conspiracy and multiple conspiracies in accordance with the proposed instruction that had been discussed at the charging conference. See Pet. App. 10a-11a (quoting instruction). The next day, believing there to be some confusion, the trial court gave a supplemental instruction on the same point. See Pet. App. 11a-12a (quoting supplemental instruction). In the court of appeals, petitioners argued that the supplemental instruction introduced a new theory of liability by permitting conviction for multiple conspiracies. The court of appeals rejected that argument (Pet. App. 10a-14a), correctly concluding that the supplemental instruction merely

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[2] Contrary to petitioners' contention, the provision of Rule 23(b), Fed. R. Crim. P., permitting an 11-person jury does not conflict with the provision of Rule 31(a), Fed. R. Crim. P., requiring that the jury's verdict be unanimous. After a court has authorized deliberations to continue with an 11-person jury, the remaining 11 jurors must still be unanimous in their verdict. Petitioners' suggestion that there is no difference between a unanimous 11-person verdict and a non-unanimous 12-person verdict is specious.

clarified the original instruction and still required the jury to find a single conspiracy in order to convict. Neither petitioner challenges the contents of the supplemental instruction in this Court.

Petitioner Smith, however, challenges two different supplemental instructions (see Smith Pet. 10) on the same ground—that they allowed the jurors to "convict on the conspiracy even if they found three separate schemes involving different people in an undefined relationship to a master conspiracy" (Smith Pet. 11). This contention is patently devoid of merit. The instructions to which Smith now objects were not the ones that were the focus of petitioners' challenge below. Moreover, the two instructions on which petitioner Smith now focuses relate only to the substantive mail fraud counts of the indictment, not to the conspiracy count. The challenged instructions thus have no bearing on the distinction between single and multiple conspiracies.

3. Petitioner Stoneman challenges (Stoneman Pet. 14-18) the denial of access to certain medical records that he sought in order to impeach the government's chief witness, John Torquato. Torquato had attended an alcoholism-treatment program. Petitioners, seeking to impeach his credibility, moved for production of Torquato's records from that program, which are confidential, absent "good cause," under the federal statute protecting the secrecy of the records of drug-rehabilitation programs. 42 U.S.C. 290dd-3. The trial court and the court of appeals both concluded that the "good cause" exception did not apply and that the Constitution did not require disclosure (Pet. App. 20a-21a, 46a).

Petitioner Stoneman argues that his due process rights were violated by the unavailability of the re-

quested medical records. The court of appeals' rejection of that argument is both correct and inherently fact-specific. Torquato admitted his alcoholism, and both he and other witnesses were subjected to extensive cross-examination on the subject (Pet. App. 20a-21a, 46a). The records would have "only marginally" helped impugn Torquato's credibility, yet their disclosure would have "severely prejudice[d] [the] public interest requiring confidentiality" (Pet. App. 21a). In these circumstances, petitioner Stoneman was not unlawfully hindered in his ability to challenge the case against him. See *United States* v. *Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); cf. *Rugendorf* v. *United States*, 376 U.S. 528 (1964) (disclosure of informer's identity subject to balancing test).

4. Petitioner Stoneman finally argues (Stoneman Pet. 18-24) that the district court's refusal to sever his case from that of petitioner Smith denied him a fair trial. The court of appeals correctly held that denial of the severance motion was within the district court's discretion (Pet. App. 21a-22a). Petitioners were properly tried together because they were charged with the same conspiracy (*id.* at 22a). See Fed. R. Crim. P. 8(b). Moreover, there is ample support for the court of appeals' conclusion that Stoneman was not prejudiced because the jury was able to "compartmentalize the evidence against each defendant" (Pet. App 22a). The jury had before it only two individual defendants. Petitioner Stoneman's role in the criminal activity (chiefly sending stock certificates and forming corporations) was clearly distinguished at trial from Smith's role (making direct approaches to public officials). The jury was instructed that Stoneman's participation in the con-

spiracy must be proved by his own acts and statements. And the acquittal of petitioner Stoneman on the substantive counts, together with the conviction of Smith on some of those counts, indicates that the jury could and did carefully sift the evidence against each defendant separately. See, *e.g.*, *United States* v. *Acosta*, 763 F.2d 671, 697 (5th Cir.), cert. denied, No. 85-5312 (Oct. 7, 1985); *United States* v. *Walker*, 720 F.2d 1527, 1533-1535 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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